Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-02-453 OF 2001
MOKHTAR SIDIN, ABDUL HAMID MOHAMED AND ALAUDDIN JJCA
25 SEPTEMBER 2001

Civil Procedure *— Injunction — Interlocutory mandatory injunction to compel delivery of vacant possession — Termination of lease — Whether option to renew lease exercised correctly — Appellant undergoing restructuring, actual state of knowledge of parties when entering agreement considered — Public interest — Whether greater injustice caused to appellant if injunction not granted*

The appellant and the respondent entered into an operator agreement ('the agreement') on 23 August 1999 under which the respondent company agreed to carry out manufacturing operations ('the activities') on part of the land ('the operator's parcel') in the possession of the appellant. The agreement granted the respondent an option to renew the lease for a further period of two years. The respondent was fully aware that the appellant was undergoing a restructuring scheme under s 176 of the Companies Act 1965. The appellant started to default in their loan repayments toward the end of 1999, and Pengurusan Danaharta Nasional Bhd ('Danaharta') purchased their non-performing loans and thereupon appointed special administrators (under the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act')) to manage the appellant's assets and affairs. Acting on the agreement, the respondent informed the appellant of their intention to exercise the renewal option through a letter dated 3 August 2000. However, the appellant notified the respondent that they were not agreeable to the extension and gave a six month notice to terminate the agreement through a letter dated 14 August 2000. The appellant wrote to the respondent giving them notice to deliver vacant possession of the operator's parcel and the machineries on 15 February 2001. The respondent claimed that they had lawfully exercised their option to renew the lease and thus were entitled to stay on the land. The appellant subsequently applied for a mandatory interlocutory injunction compelling the respondent to deliver vacant possession of the operator's parcel upon expiry of the agreement or on such other date as the High Court shall order. The learned High Court judge dismissed the application with costs. The appellant appealed. The appellant submitted that the respondent's right to exercise the renewal option was not absolute but subject to the parties mutually agreeing to extend the agreement under cl 7.01, that the appellant was entitled to give notice to terminate the agreement under cl 5.03 by giving six months prior notice in writing without assigning any reason and that the termination of the agreement was lawful. The respondent submitted that they had validly exercised the renewal option and that damages would be an adequate remedy in the situation and there were no serious issues to be tried. The records

showed that the respondent was in arrears of rental. No rentals were paid since August 2000. A

Held, allowing the appeal with costs and setting aside the learned judge's order:

(1) In an application for a mandatory interlocutory injunction, the applicant will have to show that they have an unusually strong and clear case and that there are special circumstances before the court will grant them relief (see p 40B); *Locabail International Fiance Ltd v Agroexport* [1986] 1 All ER 901 followed. Since the relief of mandatory injunction sought in an interlocutory application would be the primary relief of the applicant in his main action, the applicant must convince the court to its satisfaction that he indeed has a high degree of success at the trial of his action (see p 41A–B). B C

(2) For the renewal to take effect, two conditions must be satisfied. First, the respondent must show their intention to renew in accordance with cl 2.01.2. Second, the appellant must agree to the extension in accordance with cl 7.01. By a letter dated 14 August 2000, the refusal by the appellant to renew the lease was communicated to the respondent and the respondent was also informed that the operator agreement would be terminated six months from the date of the letter. The appellant's right to terminate the agreement was clearly spelt out in cl 5.03. However, the court did not decide whether the purported termination of the agreement by the appellant or the respondent's exercise of the option was valid or not. That was a matter to be decided at the trial, in this case, by the arbitrator before whom the dispute was pending. Those were serious issues to be tried (see pp 41D–F, H–42A). D E F

(3) The claim by the respondent that they had acquired rights over the extended period would remain an empty claim if it was not met by their corresponding duty to pay the rentals. The respondent's conduct was not at all in keeping with the oft quoted maxim 'he who comes to equity must come with clean hands', bearing in mind that an injunction is an equitable remedy (see p 42D–E). G

(4) Greater injustice would be caused to the appellant if the mandatory interlocutory injunction was not granted as there was already a third party ready and willing to purchase the entire shares of the appellant; the financial position of the appellant would deteriorate further if the sale was not allowed to proceed. Moreover, as Danaharta had stepped in, the implications of its purchase of the appellant's non-performing loans were of public interest. Consequently, the recovery of Danaharta's monies used to purchase the appellant's non-performing loans were even of greater public interest. Public interest is always a relevant H I

consideration in granting specific relief (see pp 41H–42C); *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 followed. On the other hand, there would be absolutely no injustice suffered by the respondent if the interlocutory mandatory injunction was granted as the respondent was at all material times fully aware of the critical financial position of the appellant; the respondent was aware of the risk of entering into a commercial contract with the appellant; it must have been foreseeable by the respondent when they entered into the operator agreement that the non-performing loans of the appellant was likely to be acquired by Danaharta under the Act. The state of affairs of the appellant confirmed the actual state of knowledge of the respondent at the material time and provided the rationale for the right of the parties to prematurely terminate the operator agreement without giving any reasons under cl 5.03 (see p 43D-F). In the circumstances of this case, damages would be an adequate remedy to the respondent in case they may suffer in consequence of the appellant losing their action (see p 43G).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki satu perjanjian operator ('perjanjian tersebut') pada 23 Ogos 1999 di mana syarikat responden bersetuju untuk menjalankan operasi perkilangan ('aktiviti-aktiviti tersebut') di atas sebahagian tanah tersebut ('petak operator tersebut') yang berada dalam milikan perayu. Perjanjian tersebut telah memberikan responden pilihan untuk memperbaharui pajakan untuk tempoh dua tahun lagi. Responden memang mengetahui bahawa perayu sedang menjalankan satu skima penyusunan semula di bawah s 176 Akta Syarikat 1965. Perayu mula gagal dalam pembayaran semula pinjaman mereka menjelang penghujung 1999, dan Pengurusan Danaharta Nasional Bhd ('Danaharta') membeli pinjaman-pinjaman yang tak berbayar dan melantik pentadbir-pentadbir khas (di bawah Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta tersebut')) untuk menguruskan aset-aset dan urusan-urusan perayu. Bertindak berdasarkan perjanjian tersebut, responden telah memaklumkan perayu tentang tujuan mereka untuk menggunakan pilihan pembaharuan tersebut melalui sepucuk surat bertarikh 3 Ogos 2000. Namun begitu, perayu telah memaklumkan kepada responden bahawa mereka tidak bersetuju dengan lanjutan tersebut dan memberikan notis enam bulan untuk menamatkan perjanjian tersebut melalui sepucuk surat bertarikh 14 Ogos 2000. Perayu telah menulis kepada responden memberikan mereka notis untuk menyerahkan milikan kosong petak operator dan mesin-mesin tersebut pada 15 Februari 2001. Responden menuntut bahawa mereka dengan sah telah menggunakan opsyen mereka untuk memperbaharui pajakan tersebut dan oleh itu berhak untuk menetap di atas tanah tersebut. Perayu kemudiannya memohon untuk satu

injunksi interlokutori yang mandatori mendesak responden menyerahkan milikan kosong petak operator tersebut setelah tamat perjanjian tersebut atau pada tarikh lain sebagai mana yang diperintahkan oleh Mahkamah Tinggi. Hakim Mahkamah Tinggi yang arif telah menolak permohonan tersebut dengan kos. Perayu telah membuat rayuan. Perayu menghujahkan bahawa hak responden untuk menggunakan opsyen pembaharuan adalah tidak mutlak tetapi tertakluk kepada pihak-pihak saling bersetuju untuk melanjutkan perjanjian tersebut di bawah kl 7.01, di mana perayu berhak untuk memberikan notis untuk menamatkan perjanjian di bawah kl 5.03 dengan memberikan notis enam bulan sebelumnya secara bertulis tanpa memberikan apa-apa sebab dan bahawa penamatan perjanjian tersebut adalah sah. Responden menghujahkan bahawa mereka telah menggunakan dengan sah opsyen pembaharuan tersebut dan ganti rugi adalah satu remedi yang mencukupi dalam keadaan begini dan tiada persoalan yang serius yang perlu dibicarakan. Rekod-rekod menunjukkan bahawa responden mempunyai tunggakan sewa. Bayaran sewa tidak dibuat sejak Ogos 2000.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan perintah hakim yang arif:

(1) Di dalam satu permohonan untuk satu injunksi interlokutori yang mandatori, pemohon hendaklah menunjukkan bahawa mereka mempunyai satu kes yang kukuh dan bahawa terdapat keadaan khas sebelum mahkamah memberikan mereka relif (lihat ms 40B); *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901 diikut. Memandangkan relif untuk injunksi mandatori yang dipohon dalam satu permohonan interlokutori adalah relif yang penting untuk pemohon dalam tindakan utama beliau, pemohon mesti meyakinkan mahkamah sehingga ia berpuas hati bahawa beliau mempunyai peluang yang tinggi untuk berjaya dalam perbicaraan tindakan beliau (lihat ms 41A–B).

(2) Dua syarat mesti dipenuhi untuk pembaharuan tersebut menjadi berkesan. Pertama, responden mestilah menunjukkan niat mereka untuk memperbaharui mengikut kl 2.01.2. Kedua, perayu mestilah bersetuju terhadap lanjutan tersebut mengikut kl 7.01. Melalui sepucuk surat bertarikh 14 Ogos 2000, keengganan perayu untuk memperbaharui pajakan tersebut telah dimaklumkan kepada responden dan responden juga telah memaklumkan bahawa perjanjian operator akan ditamatkan enam bulan daripada tarikh surat tersebut. Hak perayu untuk menamatkan perjanjian tersebut dengan jelas dinyatakan dalam kl 5.03. Namun begitu, mahkamah tidak membuat keputusan sama ada penamatan yang dikatakan tentang perjanjian tersebut oleh perayu atau penggunaan opsyen responden tersebut adalah sah atau tidak. Itu adalah perkara yang perlu diputuskan semasa perbicaraan, dalam kes ini, oleh penimbangtara bagi pertikaian yang masih belum selesai tersebut. Perkara-perkara demikian

merupakan persoalan-persoalan serius yang perlu dibicarakan (lihat ms 41D–F, H–42A).

(3) Tuntutan oleh responden bahawa mereka mendapat hak untuk lanjutan tempoh akan kekal sebagai satu tuntutan kosong sekiranya ia tidak selaras dengan kewajipan mereka untuk membayar sewa. Perbuatan responden tidak langsung menepati petikan maxim 'he who comes to equity must come with clean hands', dengan mengambilkira bahawa satu injunksi adalah satu remedi yang saksama (lihat ms 42D–E).

(4) Ketidakadilan akan berlaku terhadap perayu jika injunksi interlokutori yang mandatori tidak diberikan kerana telahpun terdapat pihak ketiga yang bersedia dan sanggup untuk membeli keseluruhan saham-saham perayu; kedudukan kewangan perayu akan meruntun lagi jika jualan tersebut tidak dibenarkan untuk diteruskan. Tambahan pula, memandangkan Danaharta telah campur tangan, implikasi jualan pinjaman tak berbayar perayu akan menjadi isu kepentingan awam. Kepentingan awam sentiasa menjadi satu pertimbangan yang relevan untuk memberikan relif spesifik (lihat ms 41H–42C); *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 diikut. Sebaliknya, tiada langsung berlaku ketidakadilan yang akan dialami oleh responden jika injunksi interlokutori yang mandatori diberikan kerana responden pada setiap masa matan sedar sepenuhnya tentang kedudukan kewangan kritikal perayu; responden sedar akan risiko memasuki kontrak komersial dengan perayu; ia boleh diramal oleh responden apabila mereka memasuki perjanjian operator tersebut bahawa pinjaman tak berbayar perayu kemungkinan besar boleh diperolehi oleh Danaharta di bawah Akta tersebut. Kedudukan urusan perayu mengesahkan tahap pengetahuan sebenar responden pada masa matan tersebut dan memberikan rasional tentang hak pihak-pihak untuk menamatkan perjanjian operator tersebut pra masa tanpa memberikan apa-apa sebab di bawah kl 5.03 (lihat ms 43D–F). Dalam keadaan kes ini, ganti rugi adalah remedi yang mencukupi untuk responden yang mungkin mereka akan alami berikutan kegagalan tindakan perayu (lihat ms 43G).]

Notes

For cases on interlocutory mandatory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2845–2855.

Cases referred to

Films Rover International Ltd & Ors v Cannon Films Sales Ltd [1986] 3 All ER 772 (refd)

Locabail International Finance Ltd v Agroexport [1986] 1 All ER 901 (folld)

Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133 (folld) A

Legislation referred to

Companies Act 1965 s 176
Pengurusan Danaharta Nasional Bhd Act 1998 s 40(1) B

Appeal from: Originating Summons No K24–25 of 2001 (High Court, Kota Kinabalu)

Tommy Thomas (*S Vanugopal* with him) (*Ho Chong Yong Vanugopal*) for the appellant. C

YT Woon (*Desmond Chong* with him) (*Szetu Baldev Gan & Associates*) for the respondent.

Alauddin JCA (delivering judgment of the court): By way of an inter partes summons in chambers (encl 7), the appellant (plaintiff in the High Court) applied before the learned judge for a mandatory interlocutory injunction compelling the abovenamed respondent (the defendant), either by themselves or through their servants or agents, to deliver vacant possession to the appellant or their authorized agents, the lands referred to as the 'operator's parcel' together with the assets/machinery which were leased to the respondent under the operator agreement dated 23 August 1999, upon the expiry of the said agreement on 14 February 2001, or by such other dates as the High Court shall order. D E

Having heard the above application on 29 May 2001, the learned High Court Judge dismissed it with costs. Hence the present appeal before us. F

The factual background

At the outset, it is pertinent to mention that the above application by the appellant was initiated by the special administrators appointed to the appellant under the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act'). The Act was passed by Parliament in 1998 following the economic crisis in 1997. The scope of the Act is to provide for special laws for the acquisition, management, financing and disposition of assets and liabilities by the body called Pengurusan Danaharta Nasional Bhd ('Danaharta'), the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by Danaharta, and for matters connected therewith or incidental thereto. G H

The appellant and respondent entered into what is called an operator agreement on 23 August 1999. Under this agreement, the respondent, a company having experience and expertise in plywood manufacturing, agreed to carry out manufacturing operations ('the activities') on part of the land ('the operator's parcel') in the possession of the appellant as specified in the operator agreement, together with the assets/machinery on terms and conditions therein contained. I

When the operator agreement was entered into between the appellant and respondent on 23 August 1999, the respondent was fully aware of the fact that the appellant was undergoing a restructuring scheme under s 176 of the Companies Act 1965 as reflected in the preamble to the said agreement. There is no doubt that the respondent was at all material times fully aware of the critical financial position the appellant was in. In the circumstances, it would seem apparent therefore that this operator agreement was a short term relationship between the parties.

Towards the end of 1999, when the appellant started to default in their loan repayments, Danaharta purchased their non-performing loans granted by various banks to relieve the banks of their liquidity problem and thereupon on 14 December 1999, appointed special administrators to manage the appellant's assets and affairs and to submit a workout proposal to Danaharta.

Under the terms of the operator agreement, ie cl 2.01.1 the respondent was given an option to renew the lease for a further period of two years. Acting under the said clause, the respondent through their letter of 3 August 2000 informed the appellant of their intention to exercise the renewal option.

However, in their workout proposal, the special administrators to the appellant were of the view that the best option available to the appellant that would maximize the recovery to its creditors is to sell the entire assets of the company to a third party, but found that the operator agreement dated 23 August 1999 between the appellant and respondent (under which the premises and the assets of the appellant were leased to the respondent) was onerous to the appellant.

Pursuant to the powers of the special administrators, to disclaim onerous contracts of affected persons under s 40(1) of the Act, the special administrators decided to bring to an end the said operator agreement. It was under these circumstances that the appellant notified the respondent through their letter dated 14 August 2000 that they were not agreeable to the extension and gave a six month notice to terminate the operator agreement. Subsequently on 12 January 2001, the appellant wrote another letter to the respondent giving them notice to deliver vacant possession of the operator's parcel and the machinery on 15 February 2001. The respondent replied saying that they have lawfully exercised their option to renew the lease and was entitled to remain on the said land.

In the meantime, the appellant has filed this originating summons seeking a mandatory interlocutory and a permanent injunction ordering the respondent to deliver vacant possession of the operator's parcel together with the machinery upon the expiry of the operator agreement on 14 February 2001.

Appellant's submission

It is the appellant's main contention that the respondent's right to exercise the renewal option under cl 2.01.1 is not absolute but subject to the parties

mutually agreeing to extend the said agreement under cl 7.01, and they are entitled under cl 5.03, to give notice to terminate the said agreement by giving six months prior notice in writing without assigning any reason.

It was further contended by the appellant that based on the relevant provisions of the agreement, the non-extension or termination of the said agreement was lawful.

The appellant agreed that in an application of this nature they have to show that they have an unusually strong and clear case and there are special circumstances before the court will grant relief. The case of *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901 was quoted in support.

Learned counsel for the appellant argued that their chances of success in their main action was extremely high.

In order for the renewal of the said agreement to be effective, the respondent must first show their intention to renew the lease. Notice of such intention shall be given not less than six months before the expiration of the primary period. However, under cl 7.01 the appellant must also agree to the extension.

When the respondent wrote to the appellant on 3 August 2000, it was merely an expression of their intention to renew the lease. However, by then, the appellant was already under the management of the special administrators who then was of the opinion that the said agreement was onerous to the appellant and refused the extension. In any case, there was already a third party who was willing to purchase the appellant company.

Further, the appellant had given notice of termination of the operator agreement pursuant to cl 5.03. This, according to counsel, was proper as each party was entitled to do so without assigning any reason whatsoever.

In the circumstances of this case, counsel argued that there are serious questions to be tried.

Respondent's submission

It is the respondent's submission that they have validly exercised their option to renew the lease and they have the right to be in continued possession of the operator's parcel by virtue of the contractual licence granted under the agreement.

To grant a *qua timet* mandatory injunction for the closure of the respondent's business operations would in effect grant to the appellant their substantial remedy at this early stage. The main consideration in such an application is to achieve a just result between the parties in the interim period before full trial. Counsel argued that in the circumstances of this case, damages would be an adequate remedy and there are no serious issues to be determined.

Conclusion

In an application for a mandatory interlocutory injunction, the applicant will have to show that they have an unusually strong and clear case and that

there are special circumstances before the court will grant them relief. This test was approved by the English Court of Appeal in *Locabail International Finance Ltd v Agroexport*. The rationale for this test is simple to understand. Since the relief of mandatory injunction sought in an interlocutory application would be the primary relief of the applicant in his main action, the applicant must convince the court to its satisfaction that he indeed has a high degree of success at the trial of his action.

With this in mind, we shall now proceed to see if the appellant has satisfied the test.

We shall begin by referring to the letter from the respondent's solicitors dated 3 August 2000, informing the appellant of their intention to renew the operator agreement in accordance with cl 2.01. The critical part of the letter reads '... our client intends to exercise the renewal option pursuant to cl 2.01 of the operator agreement'.

We observe that cl 2.01 consists of two sub-clauses, viz 2.01.1 and 2.01.2. Clause 2.01.1 reads thus:

> In consideration of the various covenants herein contained, TMTC agree to ... together with an option to renew the period of this lease for a period of two years commencing on the date next following expiration of the primary period ....

For the renewal to take effect, two conditions must be satisfied. First, the respondent must show their intention to renew in accordance with cl 2.01.2, which reads as follows:

> In order for the renewal option to take effect, the company shall be obliged to give notice of its intention to exercise the renewal option by giving notice of its intention to do so to TMTC not less than six months before the expiration of the primary period.

It is pertinent to note that under cl 2.01.2, the respondent merely served notice of their intention to renew the lease. This is apparent from the opening words 'notice of its intention' appearing twice in the said clause.

Second, the appellant must agree to the extension in accordance with cl 7.01 which reads:

> Unless the parties hereto mutually agree to extend this agreement, this agreement shall ... terminate upon the expiration of the primary period.

It is obvious to us by the time the respondent wrote to the appellant, ie 3 August 2000 to intimate to them their intention to renew the lease, the appellant was already under the charge of the special administrators who felt that it was no longer prudent to renew the lease as there was already a third party willing and interested to buy the appellant company. The sale would greatly reduce the appellants' financial problems. By a letter dated 14 August 2000, the refusal by the appellant to renew the lease was communicated to the respondent. In the same letter, the appellant also informed the respondent that the operator agreement would be terminated six months from the date of the letter. The appellant's right to terminate the said agreement is clearly spelt out in cl 5.03.

However, we want to make it clear that we are not deciding whether the purported termination of the said agreement by the appellant or the respondent's exercise of the option is valid or not. That is a matter to be decided at the trial, in this case, by the arbitrator before whom the dispute is pending. All we say is that those are serious issues to be tried, meaning that the respondent has crossed the first hurdle. But there are other hurdles to be crossed.

In the course of his argument before us, learned counsel for the respondent took a strong stand and consistently maintained that the respondent had lawfully exercised their option to renew the lease and therefore had acquired rights over the extended period. However, upon being asked by this court as to whether the respondent had been consistently paying the rentals in respect of the operator's parcel, counsel was hesitant in his reply. When pressed further, counsel gave a nimble reply that they were paid. But upon going through the records, learned counsel for the appellant confirmed to us that the respondent was in arrears of rental at the rate of RM197,600 per month, amounting to RM1,160,900 as at 31 October 2000. Of significant importance is the fact that no rentals were paid since August 2000. This fact was later acknowledged by counsel for the respondent.

We are of the view that the claim by the respondent that they have acquired rights over the extended period will remain an empty claim if it is not met by their corresponding duty to pay the rentals. Before the learned judge, much has been said about the inequitable conduct of the appellant by the respondent. But sad to say the respondent's conduct is not at all in keeping with the oft quoted maxim 'he who comes to equity must come with clean hands', bearing in mind that an injunction is an equitable remedy.

There is another relevant issue we have to consider in this appeal, ie justice of the case. In *Films Rover International Ltd & Ors v Cannon Films Sales Ltd* [1986] 3 All ER 772, Hoffman J had this to say at pp 780–781:

> ... The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

From the facts and surrounding circumstances of this case, we are of the opinion that greater injustice would be caused to the appellant if the mandatory interlocutory injunction is not granted. We say so for the following reasons:

(a) there is already a third party ready and willing to purchase the entire shares of the appellant. The third party purchaser was procured after the closure of a nation wide search for purchasers;

(b) the financial position of the appellant would deteriorate further if the sale was not allowed to proceed;

(c) Danaharta, the national asset company which had purchased part of the appellant's borrowings, would be unable to recover its monies, which in turn would place severe financial constraints on its capital resources, thus limiting its financial capacity to assist other financially distressed corporations;

(d) in this case, the sale of the assets of the appellant are not just private interest. As Danaharta had stepped in, the implications of its purchase of the appellant's non-performing loans are of public interest. Consequently, the recovery of Danaharta's monies used to purchase the appellant's non-performing loans are even of greater public interest. Public interest is always a relevant consideration in granting specific relief (see *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133).

In so far as the respondent is concerned, we take the view that there would be absolutely no injustice suffered if the interlocutory mandatory injunction is granted. Our reasons are:

(a) the respondent was at all material times fully aware of the critical financial position of the appellant;

(b) the respondent was aware of the risk of entering into a commercial contract with the appellant;

(c) it must have been foreseeable by the respondent when they entered into the operator agreement that the non-performing loans of the appellant was likely to be acquired by Danaharta under the Act, and the affairs of the appellant managed by the special administrators and the risk of the operator agreement being terminated as being onerous;

(d) the recital in the operator agreement confirms the actual state of knowledge of the respondent at the material time and provides the rationale for the right of the parties to prematurely terminate the operator agreement without giving any reasons under cl 5.03.

Before we conclude, we would say that in the circumstances of this case, damages would be an adequate remedy to the respondent in case they may suffer in consequence of the appellant losing their action. We notice that in addition to the undertaking given by the appellant themselves, as regards damages, this is also the undertaking given by Danaharta to the special administrators appointed to the appellants. The High Court itself had the power to impose further terms on the undertaking as a precondition for the granting of the injunctive relief.

Having given this matter our most anxious consideration, we are unanimous that this appeal must succeed.

The appeal is hereby allowed with costs. The order of the learned judge is set aside.

My learned brothers Mokhtar Sidin and Abdul Hamid Mohamed JJCA agreed with the decision delivered at the conclusion of argument. They have read this judgment in draft and expressed their agreement with it.

Appeal allowed with costs and order of the learned judge set aside.

Reported by Chew Phye Aun